IN THE

Supreme Court of the United States

October Term, 1959

No. 80

PAN AMERICAN PETROLEUM CORPORATION, a Delaware Corporation, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE, sitting as a Judge of that Court, and CITIES SERVICE GAS COMPANY, a Delaware Corporation, *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

PETITIONER'S REPLY TO BRIEF OF CITIES SERVICE GAS COMPANY IN OPPOSITION

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IN THE

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No. 914

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Opposition to review is predicated upon (1) inaccurate claims or inferences as to Federal Power Commission action; (2) assertions, contrary to views of the courts below and others, as to absence of novel questions; and (3) argument upon the merits not addressed to substantial questions of grave concern below, particularly as to interrelation of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956),

and the filed rate doctrine enunciated in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951).

I. Cities Service Gas Company (Cities), continuing collateral objections to Federal Power Commission (Commission) actions, claims the Commission has somehow erased its formal acts of 1954-1955 accepting filed rates, and blessed filing of "refund" suits in state courts (Brief in Opp., pp. 6, 10, 14, 23). To the contrary:

(a) On April 28, 1958, by Notice in its Docket No. R-168, the Commission requested pleadings upon carefully specified questions relating to the state minimum price orders, and to unprotested Commission actions, three years earlier, making filed rates effective for sales in the Hugoton Fields of Kansas and Oklahoma (see 23 Fed. Reg. 2973, May 2, 1958). Pleadings were filed by scores of persons including Cities and Petitioner; oral argument was had on July 29, 1958; *and, the matter is now pending before the Commission.* Meanwhile, Cities continues to press vigorously for judgments in the state courts. Thus, review obviously would benefit Commission consideration of questions which have arisen directly from this Court's invalidation of state pricing orders.

(b) *Cities Service Gas Co.* v. *FPC*, 255 F. 2d 860 (10th Cir. 1958), cited as reflecting the Commission's position (Brief in Opp., p. 10), had an entirely different jurisdiction fact pattern, and antedates FPC Docket No. R-168. The very differences between statutory procedures followed in that case, and collateral actions in this and other pending cases, illustrate the questions at issue. There, Cities itself attacked a tendered rate by timely protest and application for rehearing at the

Commission. Thereafter, Cities urged, and the court held, that the Commission had accepted 11 cents as a filed rate, and that Cities was aggrieved by such action, and, therefore, could seek timely review under Section 19(b) of the Act. Here, being out of time under the Act, Cities is urging that state courts have jurisdiction to entertain attacks on rates long ago filed and accepted. In fact, the Commission brief which Cities quotes (Brief in Opp., p. 10) was modified by the Commission itself by the filing of a Supplemental Memorandum to limit its statements to the facts there involved, and apparently to preclude any inference that it was passing upon the merits in dissimilar cases where filed rates had been unprotested (see 255 F. 2d 860, 865).* Despite this, Cities now argues that a holding on the merits in that case, properly brought under Section 19, is dispositive of entirely different questions of jurisdiction of state and federal courts under Section 22.

II. As in Docket No. R-168, Cities presses belated objections to Commission actions of 1954 and 1955 (Brief in Opp., pp. 6, 9, 10). Cities thereby not only lays bare its reason for seeking to erase these Commission actions collaterally, but also underscores its concession below—that rights of these parties and others

* Compare Cities' allegations with the Commission view that a letter order accepting and making rates effective "constitutes an order under Section 4(d) of the Act," reflected in *Continental Oil Co.* v. *FPC*, 236 F. 2d 839, 841 fn. 3, 842 (5th Cir. 1956); and Commission rulings that tendered rates so accepted and made effective are the "legal rates"; that there "is no valid distinction between rates made effective under different circumstances"; that rates so accepted and made effective "represent the only rates which the producer-suppliers . . . may charge, and which [their customer] may pay"; and that such filed rates can be changed only under Section 5 of the Act. Re *Tennessee Gas Transmission Company*, 14 F.P.C. 860, 861 (1955).

similarly situated *now* flow from filed rates, not from contract (see App. to Pet., p. 12a). Cities also underscores the holding below that ". . . the lower Delaware court can determine what was the legally effective rate . . .", (Brief in Opp., p. 15). Cities' admission and the holding, thus, squarely raise the heretofore undecided question of jurisdiction of state courts to decide, in light of Section 22, *not* merely a defense, but causes of action resting on duties created by the Act and Commission actions thereunder.

Cities argues that these novel questions are "well-settled." This was not the conclusion of the courts below (see App. to Pet., pp. 25a, 33a). The problem is one of intrusion of state courts into the several areas over which the Commission, the United States Courts of Appeals, and the United States District Courts, respectively, have primary and exclusive jurisdiction under Sections 19 and 22 of the Act. Cities, however, asserts that the crucial question—whether suit in collateral actions may be brought upon alleged contract rights in conflict with filed rates—is to be resolved by "the test" of whether such action could have been brought in the absence of the Act (Brief in Opp., p. 22). This begs the question. *Obviously, in the absence of the Act and Commission action thereunder,* common law actions could have been brought. Of concern to the courts below, and other state and federal trial and appellate courts, are rights of the parties and jurisdiction of the courts, *after* the Commission, under Section 4 of the Act, accepts and makes effective tendered rates. Cities admits claimed contract rights are subject to modification by Commission action under the Act (Brief in Opp., p. 22). Thus, questions at issue here, and in state and lower federal courts, turn upon such

Commission action in 1954 and 1955, and the impact thereof in barring jurisdiction of state courts to entertain actions such as Cities has brought.

III. As below, Cities stops far short of analysis of applicability, where administrative and statutory remedies have *not* been followed, of (a) the *Mobile* holding, and (b) the filed-rate doctrine of the *Montana-Dakota* case. As shown in our Petition, three federal courts have reasoned that filed rates assailable under *Mobile*, nevertheless, may become immune to collateral attack where there has been no timely administrative protest or judicial review (see Pet, pp. 18-19, and fn. 7, pp. 19-20, citing discussion by the United States Courts of Appeals for the District of Columbia, the Tenth and Third Circuits). As here, lower courts, after *Mobile*, thus, have been concerned as to what remedies, if any, remain to a person who has failed to follow administrative and statutory procedures, and later seeks to attack Commission action making filed rates effective. Cases upon which Cities relies (*Cities Service Gas Co.* v. *FPC*, 255 F. 2d 860 (10th Cir. 1958); *Natural Gas Pipe Line Co. of America* v. *FPC*, 253 F. 2d 3 (3rd Cir. 1958); *Phillips Petroleum Co.* v. *FPC*, 258 F. 2d 906 (10th Cir. 1958); *Kerr-McGee Oil Industries* v. *FPC*, 260 F. 2d 602 (10th Cir. 1958)) were all *timely* review proceedings under Section 19(b). Such is not the case here, nor in the other collateral actions, which raise questions of state-federal jurisdiction not involved in *Mobile*. Similarly, Cities' effort to narrow the *Montana-Dakota* bar by limiting it to rates "approved" as "reasonable" illustrates the error below (Brief in Opp., pp. 15-16). This Court held that the bar to collateral attack applies *whether* a filed rate is "fixed" *or* "merely accepted" by the Commission (see Pet.,

pp. 15-16, and fn. 8, p. 20). Cities' misreading thus underscores misinterpretation of the case below and the need for review.

IV. Cities' discussion of applicability of Section 22 of the Act (Brief in Opp., pp. 16-24), also highlights the gravity of state courts' assumption of powers vested in the Commission and federal courts. Cities conceded below that "the only legal rate is the filed rate." (App. to Pet., p. 12a). Since filed rates are the *only legal* rates, and the *legal* rights and duties of parties, therefore, flow from the filed rates, state courts cannot entertain actions under any guise which seek to enforce rights or liabilities so created by filed rates, in the light of the explicit language of Section 22 placing "exclusive jurisdiction" in the federal courts. Thus, this is not a case of barring "removal" because a question "may" be raised on defense, nor of actions "relating to" rights ancillary to patents, copyrights, etc. (Brief in Opp., pp. 18-19). The record and opinions show that at the time of the ruling on Motions for Summary Judgment raising the jurisdictional issue, Cities (the plaintiff) had, in its own pleadings, recharacterized its actions by conceding that its claimed legal rights must rest upon the filed rates under the Act, whatever those rates may be. Necessarily, any alleged contract right has been superseded or overridden by the legal, filed rates. Thus, Cities' current theory can stand *only if* action by a regulatory commission accepting and making effective tendered rates as the filed rates, has no legal significance whatsoever, does not control the right to a particular rate, and may be negated by state courts in collateral proceedings. This is the holding below, and it is contrary to the most fundamental principles of administrative and rate regulatory law.

State and federal courts and the Commission now face the very issues here presented; and scores of persons, whose rates are subject to Commission jurisdiction, are being subjected to lengthy, costly trials and appeals in collateral attacks upon their filed rates. Early resolution of the jurisdictional questions at issue here is sorely needed to assure uniform results and to provide guidance in administration of the Act.

CONCLUSION

For the foregoing reasons, and those set forth in our Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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